ALJ/KOT/wgp

Decision 97-11-021 November 5, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking on the Commission's own motion for purposes of compiling the Commission's rules of procedure in accordance with Public Utilities Code Section 322 and considering changes in the Commission's Rules of Practice and Procedure.	R.84-12-028 (Filed December 19, 1984)

OPINION ON FINAL RULES IMPLEMENTING SB 960

1. Introduction

In today's decision, we make revisions to a few of the rules in our "Draft of Final Rules" (as set forth in Decision (D.) 97-07-065) implementing Senate Bill (SB) 960 (Leonard, ch. 96-0856). The complete draft, with these revisions indicated in the margin, appears in the Appendix to today's decision.

The background to the development of these rules is detailed in D.97-07-065 and Resolutions (Res.) ALJ-170 (Jan. 13, 1997) and ALJ-171 (March 18, 1997). All three of these orders, as well as related materials, can be reviewed at the Commission's Internet site (www.cpuc.ca.gov). In the following pages, we will describe the revisions, note necessary codification changes (renumbering certain rules and changing cross-references to those rules), respond to comments on the draft rules, and summarize our current plans for further improvements to our handling of formal proceedings and of informal matters (advice letters).

2. Revisions

We today make available the last revisions we anticipate before our adoption of the rules implementing SB 960. All of the revisions are either nonsubstantial, solely grammatical, or closely related to the draft rules set forth in D.97-07-065. Comment, limited to these revisions, will be due 15 days from today's decision.

Rule 4(b). In Res. ALJ-171, we explained that our SB 960 rules would not apply to the expedited complaint procedure. The revised draft of the final rules reflected this exclusion in Rule 4(a); however, for clarity, the exclusion should also be stated in Rule 4(b).

Rule 5(l). There is a typo: The term "ratemaking," used twice in this subsection, should be "ratesetting," which is the term used in SB 960. Also, Rule 5(k) makes clear that "presiding officer" is a generic term that includes the "principal hearing officer" in a ratesetting proceeding. There is no need to extend the latter term to include the assigned Commissioner in a quasi-legislative proceeding; in fact, such extension would be inconsistent with Rule 5(k). Thus, the phrase "or quasi-legislative " should be stricken from Rule 5(l).

Rule 6(b)(3). Typo: The comma following "the" at the end of the first line should be stricken.

Rule 6(d). For consistency with the other headings, change this heading to "Proceedings Filed Before January 1, 1998."

Rule 6(e). For consistency with the other subsections in Rule 6, give subsection (e) a heading ("Proposed Schedules").

Rule 7(a). Clarify requirements regarding ex parte communications occurring during the period between the filing of a proceeding and the determination of the category of the proceeding.

Rule 8(d), 8(f)(4). Revise definition of Commissioner "presence" to mean physical attendance at a hearing or argument, except that a Commissioner who is surplus to the existence of a quorum may attend an argument from a remote location linked via real-time, two-way communication to the hearing room.

Rule 8.1(b). Change "ratemaking" to "ratesetting;" change "principal hearing officer" to "presiding officer." For discussion, see explanation of revisions to Rule 5(l), above.

Rule 63.2(a). Incorrect cross-references: In the second line of this subsection, the reference to Rule 6(e) should be to Rule 6(d), and the reference to Rule 6(d)(1) should be to Rule 6 (c)(1).

Rule 63.9. Clarify the rule to indicate that any written response by an Administrative Law Judge to a petition for reassignment for cause, as authorized by Rule 63.4(c), will be filed and served in the proceeding in which the petitioner requested such reassignment.

3. Changes to Codification

To accommodate new Article 2.5, which will contain the SB 960 rules, the rules in existing Article 2 ("Filing of Documents") will be renumbered. The rules currently numbered 2 through 8.01 contain formal requirements (e.g., captions, verifications, errata); these rules will be renumbered 2 through 2.7. The rules currently numbered 8.11 through 8.15 describe filing procedures (e.g., where to file, computation of time, filing fees); these rules will be renumbered 3 to 3.4. Table 1 shows the renumbering for each rule in Article 2.

TABLE 1

Renumbering of Article 2

Existing Rule#	Becomes Rule#
2	no change
3	2.1
4	2.2
5	2.3
6	2.4
7	2.5
8	2.6
8.01	2.7
8.11	3
8.12	3.1
8.13	3.2
8.14	3.3
8.15	3.4

The renumbering shown in Table 1, and the revised cross-references shown in Table 2, are the only changes to Article 2 under today's decision. In other words, the changes to these rules are strictly nonsubstantive.

The rules in Article 2 are referred to frequently in the Rules of Practice and Procedure. These references are revised to reflect the renumbering summarized above. Table 2 shows rules where the references to Article 2 are revised accordingly. Again, the changes to these rules are strictly nonsubstantive.

TABLE 2

Rules to be Revised to Refer to Renumbered Article 2 Rules

Note that several of the rules in this table will exhibit both kinds of codification changes, i.e., they will be renumbered and their references to other rules will be revised, consistent with the renumbering.

Existing Rule 3 (becomes Rule 2.1)	Article 7 (Preamble)
Existing Rule 4 (becomes Rule 2.2)	Rule 33
Existing Rule 5 (becomes Rule 2.3)	Rule 35
Existing Rule 6 (becomes Rule 2.4)	Article 10 (Preamble)
Existing Rule 7 (becomes Rule 2.5)	Rule 42.2
Existing Rule 8.01 (becomes Rule 2.7)	Rule 43.2
Existing Rule 8.11 (becomes Rule 3)	Rule 43.8
Rule 10	Rule 44.1
Rule 13.1	Rule 44.3
Rule 14.6	Rule 44.6
Rule 18 (Rule 18(o)(3) also will be revised to refer to the current rules on protests, i.e., Rules 44 through 44.6)	Rule 45 Rule 47
Rule 21	Rule 77.6
Rule 23	Rule 78

4. Discussion of Comments

The rules set forth in the Appendix are the result of several years of discussions and deliberations concerning improvements in how the Commission handles its formal proceedings. Over the past year, since the Governor signed SB 960 into law, our work on these improvements has intensified.[1] The resulting rules have benefited from our experience in the experiment commenced with Res.ALJ-170, from freewheeling discussion in workshops and other public forums, and from five rounds of written comments on successive iterations of the experimental and proposed final rules. The internal effort and solicitation of public input are commensurate with the importance of our charge from the Governor and the Legislature to put our house in order.

The final rules incorporate a great many suggestions from the commenters. Where controversy remains, it concerns, generally, issues over which there was no consensus even among the commenters. These issues are: categorization of proceedings; Commissioner presence; and reassignment of administrative law judges (ALJs). For these issues, as discussed below, we have made our best judgment, which has benefited from experience gained in our experimental implementation of SB 960 requirements.

Categorization of Proceedings. There seems to be a philosophical debate between those commenters who think the bulk of the Commission's business is, or should be, the making of policy guidelines, to be applied prospectively, and those commenters who think the bulk of the Commission's business consists of proceedings that mix questions of fact and questions of policy. The former commenters would like to see most proceedings categorized as quasi-legislative; the latter commenters would like to see most proceedings assigned to the category that lies between adjudicatory and quasi-legislative. In SB 960, the in-between category is called "ratesetting," although the category clearly embraces many other types of proceedings, such as certifying a major new utility facility or reviewing a proposed merger of utilities.

[1] Further initiatives will follow today's decision. See Section 5 below.

Our analysis does not start with any preference for one or another category of proceeding. Our focus, instead, is on the nature of the determinations we will need to make in the proceeding we are categorizing. It is clear from both SB 960 and our implementing rules that policy enforcement, whether initiated by the Commission itself or by a complainant, is by nature adjudicatory and should be so categorized; policy development, on the other hand, involves entirely or predominantly legislative determinations, and proceedings concerned entirely or predominantly with such determinations should be categorized as quasi-legislative. Policy implementation, however, is not simply a matter of adjudicatory facts or legislative facts but commonly mixes the two. The ratesetting category most nearly approximates the mixed nature of policy implementation, and for this reason our rules state that a proceeding not clearly falling within any of the statutorily defined categories will be conducted under the rules applicable to the ratesetting category unless we find that another category (or a special hybrid of procedural rules) is better suited to that particular proceeding.

Currently, much of the Commission's caseload is taken up with policy implementation, which is not surprising considering the enormous amount of policy development that has gone into the restructuring of the telecommunications and energy industries and that is now largely behind us. Over time, the emphasis may shift to policy enforcement or back to policy development. We are satisfied that we now have the procedural mechanisms in place to swiftly and effectively register such shifts and to reflect them in our case management.

Commissioner Presence. Our own rethinking of the Commission's processes has consistently emphasized direct Commissioner involvement in case management and Commissioner accountability for outcomes. The legislative intent of SB 960 has the same emphasis, and to these ends, SB 960 requires Commissioners to be "present" for certain events, depending (among other things) on the category of proceeding and whether the Commissioner is presiding. We have proposed that this requirement can be satisfied by "remote attendance (to the extent permitted by law) by electronic communications link…establishing real-time, two-way communication between the hearing room and the attending Commissioner."

There is concern that such remote attendance may fall short of the quality of participation made possible only by the physical presence of the Commissioner in the hearing room. We share this concern. We have decided that, consistent with good practice and the spirit of SB 960 as we understand them, Commissioner "presence" should be defined generally to mean physical presence in the hearing room. We provide for remote attendance in one situation: Where SB 960 requires that a quorum of the Commission be present for "final oral argument," see Public Utilities Code §§ 1701.3(d) and 1701.4(c), those Commissioners who are surplus to the existence of a quorum at the site where the argument is held may choose to participate in the argument via electronic communications link. We have revised our proposed rule accordingly.

ALJ Reassignment. Before enactment of SB 960, the Commission had adopted rules (in Article 16 of the Rules of Practice and Procedure) for disqualification of ALJs. These existing rules responded to PU Code Section 309.6 (enacted in 1993), which directed the Commission to "adopt procedures on the disqualification of [ALJs] due to bias or prejudice similar to those of other state agencies and superior courts." Implementing this general direction, the rules contained a detailed list of "grounds for disqualification."

Unlike the general direction on the subject in PU Code Section 309.6, SB 960 is very specific about the grounds for disqualification. In an adjudicatory or ratesetting proceedings, SB 960 provides "unlimited peremptory" challenges to all parties whenever the assigned ALJ (1) has, within the previous 12 months, served in an advocacy position at the Commission or been employed by a regulated public utility, (2) has served in a representative capacity in the proceeding, or (3) has been a party to the proceeding.[2]

[2] We understand the Legislature's characterization of this challenge as "peremptory" to mean that the challenging party need not demonstrate actual bias on the part of the assigned ALJ but need show only that the factual predicate exists, namely, that the ALJ, before his or her assignment, functioned in one of the roles specified by the statute.

In addition to the "unlimited peremptory" challenge, SB 960 provides, for adjudicatory proceedings, that "all parties are entitled to one peremptory challenge" of the assigned ALJ. (Emphasis added.)[3] SB 960 does not instruct the Commission how these new provisions should relate to the Commission's existing rules on ALJ disqualification, nor does SB 960 repeal PU Code Section 309.6, under which the existing rules were adopted. In these circumstances, implementing SB 960 regarding disqualification procedure required us to make several judgments on interpretation and policy. We describe below the more significant judgment calls.

First, we decided that it would not make sense to have two distinct procedures for ALJ disqualification, depending on the vintage of the proceeding. To do so would not be necessary, and would be confusing to all concerned. We therefore revised the existing rules to apply to all open proceedings, pre- or post-SB 960.

We also pared back the existing rules' detailed list of "grounds for disqualification" in light of the specificity now provided by SB 960. However, along with the specific peremptories in SB 960, the revised rules continue to provide generally for challenges for cause where the assigned ALJ (1) has a financial interest in the subject of a proceeding or in a party to the proceeding, or (2) has bias, prejudice, or interest in the proceeding.

We also implemented the limited peremptory in adjudicatory proceedings as a limitation to one per side. We expect that many adjudicatory proceedings will have only two parties, and hence two sides. In the multi-party situation, we provided that a party seeking to exercise the limited peremptory would have the opportunity to show that its interests are "substantially adverse" to other parties that might seem to be aligned on its side in the proceeding.

Finally, although SB 960 only provides a limited peremptory in adjudicatory proceedings, our rules also allow such a peremptory in ratesetting proceedings. However, because ratesetting proceedings often have many parties and many different

[3] Our rules refer to this one-time-only challenge as an "automatic" peremptory.

sides, our rule provides that there will be not more than two reassignments pursuant to such peremptories in the same ratesetting proceeding.

Some commenters have criticized our proposed rules as being too liberal in allowing challenges to assigned ALJs; other commenters have criticized the rules as too narrow. Our response, simply, is that the rules continue to allow challenges on all reasonable grounds, and they allow challenges to assigned ALJs in both categories of proceeding (adjudicatory and ratesetting) in which ALJs are authorized to preside over formal hearings and to write decisions. We are confident that the rules, consistent with SB 960, ensure both actual fairness and the perception that the process gives all participants a fair shake.

Other Comments. Many commenters suggested additional areas for rulemaking (e.g., clarification of the term "party" and requirements for party status), and they also urged us to increase our utilization of the Internet to give access to documents and notice of events in proceedings. These suggestions go beyond the scope of the current rulemaking but they dovetail with our plans for further procedural reforms. See Section 5 below.

Several commenters raise points of clarification, which we address below.

California Manufacturers Association (CMA), referring to our statement in D.97-07-065 that orders instituting investigation (OIIs) "commonly will be adjudicatory proceedings," cautions that OIIs often, in the past, have been consolidated with general rate cases and industry restructuring, neither of which seems properly categorized as adjudicatory. We agree with this caution. The categorization of any OII, especially one that is part of a consolidated proceeding, should give due consideration to the character of the particular OII.

CMA also asserts that service on all parties, the ALJ, and the Docket Office of copies of a written ex parte communication should satisfy the reporting requirements of Rule 7.1(a). There seems to be some confusion over what those requirements are, in practice. The copies to Docket Office must be accompanied by a "Notice of Ex Parte Communication," as required by that rule, to ensure proper handling of the document. We agree, however, that Rule 7.1(a)(3), which requires that the Notice include a

"description of the…communication and its content", is satisfied by referring to the copy of the written communication provided with the Notice. In other words, it is not necessary for the Notice to separately describe or paraphrase the content of the written communication. Similarly, the written communication will likely disclose on its face the information specified in Rules 7(a)(1) and 7(a)(2). To the extent such information does not appear on the face of the written communication (e.g., if it is undated), the Notice must include the information.

Pacific Bell thinks "consumer organization" should be specifically included in Rule 5(h)(3), where "interested person" is defined to include:

> a representative acting on behalf of any formally organized civic, environmental, neighborhood, business, labor, trade, or similar association who intends to influence the decision of a Commission member on a matter before the Commission, even if that association is not a party to the proceeding.

This definition is part of SB 960's framework for dealing with ex parte communication, and the list of organizations comes from the statute. We believe the list is already sufficiently comprehensive to encompass consumer organizations.

Southern California Edison (SCE) reads the draft rules to require an ALJ to preside at workshops in a quasi-legislative proceeding. SCE is mistaken. The rules require the assigned Commissioner to preside over hearings at which testimony is offered on "legislative facts." Such a proceeding might also involve a hearing at which testimony is offered on "adjudicative facts."[4] The draft rules direct the assigned ALJ to preside at the latter type of hearing in the absence of the assigned Commissioner. There is nothing in the draft rules that either requires or prevents the assigned ALJ or the assigned Commissioner from presiding at "workshops," which is not a term we use to refer to "hearings." Workshops are not a "hearing" of any kind, whether formal or

[4] For example, in electric restructuring (a proceeding that would likely be categorized as quasi-legislative), we held evidentiary hearings on the issue of transition costs.

informal; they are seldom transcribed, and "testimony" cannot be offered in a workshop.

The Utility Reform Network (TURN) finds confusing our use of the term "appeal of categorization" to implement SB 960's "request for rehearing" of our determination "as to the nature of the proceeding." We created the term "appeal of categorization" because the statutory terminology is easily (and wrongly) confused with applications for rehearing pursuant to PU Code Section 1731(b). Any time within 30 days after an application for rehearing is denied, the rehearing applicant may seek judicial relief. This is not true of a categorization appeal. Under SB 960, the appellant cannot immediately seek judicial review of a Commission decision rejecting the appeal; instead, the appellant must wait until "conclusion of the proceeding" before it can challenge, in court, the decision rejecting the categorization appeal. In these circumstances, we think clarity is better served by not using "rehearing" in connection with the categorization process.

TURN believes the "date of issuance" of an order or decision should be defined. TURN is correct in its assumption that we are using the term consistent with its definition, in Rule 85 of the Rules of Practice and Procedure, as the date of mailing. However, we hope in the near future to be able to make our decisions and orders accessible via the Internet, so we defer to later rulemaking the development of a new or modified definition of "date of issuance." See Section 5 below.

Regarding the formal complaint procedure, TURN correctly notes that the Docket Office will need to serve the "Instructions to Answer" on complainants as well as defendants, so that all the parties will be aware of the assigned ALJ and category of the proceeding. Our internal operating procedures already provide for such service.

Regarding the deadline for resolving a proceeding (12 or 18 months, depending on the category), TURN correctly assumes that the deadline does not include such post-decision filings as applications for rehearing. The Commission can only plan to complete processes within its control, and cannot know in advance which decisions will be challenged. To assume all decisions will be challenged, and to shorten the

process leading to a decision in order to accommodate a rehearing, would be speculative, impractical, and counterproductive in many situations.

TURN correctly assumes that the term "public utility pipelines" in Rule 8.1(b) refers to oil pipelines. The PU Code includes "pipeline corporation" in the list of public utilities, and it defines "pipeline" as "property [used to deliver] crude oil or other fluid substances (except water)." See PU Code §§ 216(a), 227, and 228.

TURN makes several requests for clarification that, essentially, urge the Commission to be flexible and sensitive to the characteristics of particular proceedings in applying the new SB 960 rules. In response, we call everyone's attention to existing Rule 87, which continues to apply to all our Rules of Practice and Procedure (including the SB 960 rules), and which says in relevant part:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules."

No one should believe, however, that Rule 87 is a way to get around the spirit and intent of SB 960.

We find disturbing, in this regard, TURN's question, "Is it…part of the 'culture change' brought about by these new rules that parties must formally request hearings in every case, even when it seems obvious that they will be held anyway?" (Emphasis in original.) This question misses a fundamental point. The message we hear from the Governor and the Legislature is that the Commission should actively manage its proceedings from beginning to end. The SB 960 rules provide ample opportunity for participants in a particular proceeding to suggest how we should manage that proceeding. However, a party that does not bother to participate in the scoping process because of prior practice (e.g., the proceeding is of a kind for which, according to TURN, "parties traditionally have not bothered to file protests or requests for a hearing") will run the risk that the hearings held (if any) and the issues considered in the proceeding will differ from what the party expected. We will not indulge belated requests from such a party to add hearings or issues.

5. Further Improvements to Commission Processes

Today's decision marks a major step, but by no means the last step, in our comprehensive rethinking of how the Commission processes should work. We have a three-part plan for further improvements.

First, we will continue to work on ways to better handle formal proceedings. We will close this rulemaking when final adoption of the SB 960 rules is completed (before the end of this calendar year), but at the same time, we recognize that our Rules of Practice and Procedure need improvement in other specific areas. Among these areas we intend to begin new rulemakings in the near future on discovery and settlement rules, both of which are deeply affected by SB 960 reforms. As the number of proceedings handled under pre-SB 960 procedure dwindles with the completion of these old proceedings, parts of the existing Rules of Practice and Procedure should be repealed, as should other parts that, arguably, are out-of-date. With more experience, we will also fine-tune the SB 960 rules.

Second, we have process concerns that go beyond our formal proceedings. Much of the Commission's business consists of informal matters known as "advice letters." As the name implies, these are informal notices to the Commission of an action proposed by the filing utility, which action the filing utility believes, for various reasons, does not need a formal application for Commission approval. However, advice letters are subject to protest. With competition expanding across many utility sectors, we expect that advice letters will increase as new market entrants, as well as incumbent utilities, gain flexibility to offer a greater variety of services under a vast array of pricing and other terms and conditions of service. For these reasons, we believe that the process for review of advice letters must be as open, transparent, and precisely defined as our process for formal proceedings. Our staff has already held workshops with stakeholders to discuss the existing general order on advice letters (General Order 96-A), and as our thinking matures, we plan to start a rulemaking on the advice letter process that will complement our efforts with respect to formal proceedings.

The third part of our plan for improvement will affect both advice letters and formal proceedings, as well as our efforts, independent of particular proceedings, to provide

service and safety information to consumers and the general public. In essence, we want to intensify our use of electronic communications, most notably via the Internet, to enable wider, more rapid dissemination of information regarding all of the Commission's activities.

We already use our Internet site (www.cpuc.ca.gov) for many things, including posting our Daily Calendar and providing information about important proceedings and developments in the restructuring of the energy and telecommunications industries. We can and should do much more.

We envision a Commission Internet site from which, eventually, our decisions, resolutions, rulings, and general orders could be downloaded, while links to other sites would enable the downloading from those sites of tariffs and a host of other documents submitted to the Commission. By providing electronic notice and access, we can reach a broader community, enable more timely communication of documents and deadlines, and save on mailing, copying, and associated costs.

Our staff has already begun the outreach effort through formation of an informal "electronic notice and access technical (ENAT) working group." The ENAT group will focus on the "how to" issues. We plan to open a rulemaking soon to address the "what next" issues, i.e., goals and priorities for our Internet utilization, and to ensure that our Rules of Practice and Procedure on service of documents and related topics keep up with our electronic capabilities.

Findings of Fact

1. The Appendix to today's decision contains appropriate revisions to the previous draft, i.e., the "Draft of Final Rules" proposed in D.97-07-065 to implement SB 960. These revisions are nonsubstantial, solely grammatical, or closely related to the text of the previous draft.

2. The renumbering summarized in Tables 1 and 2 is nonsubstantive.

Conclusions of Law

1. The "Draft of Final Rules, "with the revisions shown in the Appendix, should be made available to the public for 15 days before final action by the Commission.

Comment, limited to these revisions, should be filed and served no later than 15 days after the effective date of today's decision.

2. To ensure timely final action on the "Draft of Final Rules," today's decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. Comments on the revisions to the "Draft of Final Rules," as shown in the Appendix to today's decision, are due to be filed and served no later than 15 days after the effective date of today's decision.

2. The Chief Administrative Law Judge shall prepare all necessary forms, and submit them to the Office of Administrative Law to accomplish the nonsubstantive renumbering summarized in Tables 1 and 2 of today's decision.

3. This order is effective immediately upon approval today.

Dated November 5, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners